



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 17, 2003

Mr. Richard A. Peebles
Attorney at Law
4001 Garth Road, Suite 107
Baytown, Texas 77521-3115

OR2003-6518

Dear Mr. Peebles:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188038.

The Port Neches-Groves Independent School District (the "district") received a request for information related to a named district employee, including that employee's personnel file, and minutes of school board meetings for the past two years. You state that the requested minutes will be furnished to the requestor. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the records at issue are medical records, access to which is governed by the Medical Practice Act (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the

information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the medical records subject to the MPA.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." In Open Records Decision No. 643 (1996), this office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation and that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. See Open Records Decision No. 643. You do not inform us, however, whether any of the submitted evaluations relate to an individual who held a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and was engaged in the process of teaching, at the time of the evaluation, or who held an administrator's certificate under subchapter B of chapter 21 of the Education Code, and was performing the functions of an administrator, at the time of the evaluation. See Educ. Code § 21.355; Open Records Decision No. 643 at 4. To the extent that the submitted evaluations relate to an individual who qualified as a teacher or administrator under section 21.355 of the Education Code at the time of the evaluation, the submitted evaluations are excepted from disclosure under section 552.101 of the Government Code. An evaluation of an individual who did not qualify as a teacher or administrator under section 21.355 at the time of the evaluation is not confidential under that section and therefore may not be withheld under section 552.101.

We also note that the submitted information contains an Employment Eligibility Verification, Form I-9. A Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Public Information Act (the "Act") would be "for purposes other than for enforcement" of the

referenced federal statute. Accordingly, we conclude that the Form I-9 is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

You contend that a portion of the personnel information at issue is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Industrial Foundation*, 540 S.W.2d at 683-85.

Section 552.101 of the Government Code encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Foundation*, 540 S.W.2d at 685. This office has found that personal financial information is generally excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy). We have marked personal financial information that the district must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. The district may not withhold any other information under common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 438 (1986) (work behavior of a public employee and the conditions for the employee's continued employment are matters of legitimate public interest not protected by the common-law right of privacy), 423 at 2 (1984) (explaining that because of the greater legitimate public interest in the disclosure of information regarding public employees, employee privacy is confined to information that reveals "intimate details of a highly personal nature").

Section 552.102 of the Government Code also protects from disclosure most information on a transcript from an institution of higher education maintained in the personnel files of

professional public school employees. Gov't Code §552.102(b). Section 552.102(b) excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Accordingly, with the exception of the employee's name, courses taken, and degree obtained, we determine that the district must withhold the submitted transcripts from disclosure under section 552.102 of the Government Code.

You also seek to withhold the employee's Examination for the Certification of Educators in Texas ("ExCET") score report under section 552.102. The ExCET examination report, however, is not "a transcript from an institution of higher education" and, therefore, may not be withheld under section 552.102(b). *Cf.* Open Records Decision No. 526 (1989) (section 552.102(b) excepts certain portions of professional public school employees' college transcripts from required public disclosure); *see generally* Open Records Decision Nos. 444 at 5-6 (1986) (public employee's qualifications and performance are subject to a legitimate public interest); 441 at 3 (1986) (identities of teachers who did not pass the TECAT examination are matter of legitimate public interest). We determine that the district may not withhold the submitted ExCET score report under section 552.102 of the Government Code.

Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which is also encompassed by section 552.101. Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Public Information Act (the "Act") in accordance with FERPA.

In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and

necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student’s identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student’s handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We have marked the information that must be redacted from the submitted records pursuant to FERPA and section 552.114. We also note that to the extent the names that have been blacked out from the submitted documents are students, that information must also be withheld under FERPA and section 552.114.

Next, you assert that portions of the submitted information are excepted under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the district must withhold the above-listed information for all current or former officials or employees who elected, prior to the district’s receipt of this request, to keep such information confidential. The district may not withhold such information under section 552.117 for anyone who did not make a timely election. You state that the submitted documents constitute “all documents found in the personnel file of [the named individual].” You have provided documentation showing this employee timely elected to keep his home address and telephone number confidential. You have not provided any documentation showing he timely elected to withhold his social security number and family member information. Therefore, only the employee’s home address and telephone number, which we have marked, must be withheld under section 552.117.

We note that the employee’s social security number may nevertheless be confidential under federal law. A social security number may be excepted from disclosure in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any social security number in the responsive records is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, you should ensure

that no such information was obtained or is maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We also note that the submitted documents contain a driver's license number. Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. Thus, the district must withhold the driver's license number we have marked pursuant to section 552.130.

Finally, we note that the submitted documents contain account numbers that are subject to section 552.136 of the Government Code. This section provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account numbers that the district must withhold under section 552.136.

To summarize, we conclude that: (1) medical records may be released only as provided under the MPA, (2) the evaluations you have marked are confidential under section 21.355 of the Education Code and must therefore be withheld pursuant to section 552.101 of the Government Code if they relate to an individual who qualified as a teacher or administrator under section 21.355 of the Education Code at the time of the evaluation, (3) the Form I-9 is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system, (4) the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy, (5) with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the submitted transcripts from disclosure under section 552.102, (6) the district must withhold the student-identifying information we have marked pursuant to section 552.114 and

FERPA, (7) the district must withhold the employee's home address and telephone number under section 552.117(a)(1), (8) social security numbers may be confidential under federal law, (9) the district must withhold the driver's license number we have marked pursuant to section 552.130, and (10) the district must withhold the account numbers we have marked under section 552.136. The remaining information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

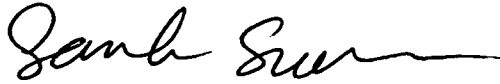
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts: Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 188038

Enc. Submitted documents

c: Mr. Dave Rogers
Port Arthur News
P. O. Box 789
Port Arthur, Texas 77641
(w/o enclosures)